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No. 06-766

IN THE

Supreme Court of the United States

NEW YORK STATE BOARD OF ELECTIONS, ET AL.,
Petitioners,

v.

MARGARITA LÓPEZ TORRES, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Republican National Committee ("RNC") is the national political organization of the Republican Party of the United States.[1] From endorsing candidates, to supporting candidates and party organizations, to sponsoring voter registration, education and turnout programs, the RNC is involved in a wide range of party-building activities.

The RNC promotes candidates in all fifty states for a myriad of state and local offices from the statehouse to the courthouse. The RNC is directly affected by a ruling, such as the ruling of the U.S. Court of Appeals for the Second Circuit in this case, that limits a political party's ability to form a strong leadership group, endorse and support candidates, and generally organize itself as it sees fit to advance the party's interests. The RNC also is directly and adversely affected by a rule of law, such as that announced by the Second Circuit, that ties the constitutionality of state election statutes to the independent actions of party officials. Simply put, the Second Circuit's ruling in this case has the potential to limit severely the ability of the RNC to engage in the kind of core political speech and association that is central to its purpose and that it routinely promotes in other states, including by endorsing candidates for public office.

The RNC has filed briefs *amicus curiae* before this Court in numerous ballot access and other voting rights cases in recent years. *See, e.g., Republican Party of Minnesota* v. *White*, 536 U.S. 765 (2002); *California Democratic Party* v. *Jones*, 530 U.S. 567 (2000). Because of the direct impact of the Second Circuit's ruling on the speech and associational rights of political parties, and because of the RNC's experience in supporting candidates for judicial office across the

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the RNC, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

nation, the RNC is well positioned to assist this Court in understanding the issues presented by the petition for certiorari.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a); the requisite consent letters have been filed with the Clerk.

INTRODUCTION

The RNC respectfully submits that the Second Circuit made three serious errors in its opinion in *Lopez Torres* v. *New York State Board of Elections*, 462 F.3d 161 (2d Cir. 2006) (Pet. App. 1-85). This Court should grant the petition for certiorari because failure to correct these errors could have serious implications for the associational rights of political parties, and could throw into uncertainty the continued constitutionality of an untold number of state and federal election mechanisms.

First, the Second Circuit fundamentally misunderstood New York State's judicial election system. It deemed the system unconstitutionally burdensome because state law makes it difficult for judicial candidates to appeal directly to rank-and-file voters at the nomination stage. Pet. App. 15-17. But the law in question was not *designed* to permit candidates to appeal to rank-and-file voters at the nomination stage, and there is not, and has never been, any constitutional requirement that such interaction be allowed. As a result of this misunderstanding, the court below erred by (1) positing an election scheme that New York State did not adopt, (2) criticizing the State for "burdening" the rights of participants in that non-existent scheme, and (3) relying on this "burden" to strike the State's laws from the books.

Second, the Second Circuit identified several supposed burdens that state law places on associational rights at the convention stage of the New York judicial election process. But these supposed burdens stem not from state law itself, but from the voluntary actions of party officials and voters operating within the ambit of that law. The court's error

presents an opportunity for this Court to clarify that a state law is invalid under its ballot access jurisprudence only if the state law itself, and not the acts of private individuals, offends the Constitution. The contrary rule embraced by the Second Circuit would make the constitutionality, or lack thereof, of statutory texts turn on the (mutable) actions of political party officials over whom the state has little control. Such a rule not only would create lingering and unavoidable uncertainty about the constitutionality of state election laws, but would threaten the established associational freedoms of party members.

Third, the Second Circuit found that the perfectly normal workings of a political party—namely, that party leaders express support for certain candidates and that, in the convention format, those candidates tend to receive the party's nomination—constitute an impermissible burden on First Amendment associational rights. But it cannot be that New York's election law is unconstitutional simply because party leaders wield influence over party decision-makers; if this were so, it could only follow that the election laws of many states—not to mention presidential nominating conventions from the mid-19th century through at least 1968—are unconstitutional.

In sum, the RNC strongly believes in the right of a political party—any party—to organize and operate in the way it believes best serves its beliefs and interests. Absent review by this Court, the decision below will cast into doubt the constitutionality of myriad state election laws and the bedrock associational freedoms of political parties.

STATEMENT

I. THE STRUCTURE OF THE NEW YORK STATE JUDICIAL ELECTION SYSTEM

An understanding of the flaws of the decision below requires a close look at New York's judicial election system.

For the last 85 years, New York State has employed a three-part process for the selection of its trial-court judges

(who are denominated Supreme Court Justices). Pet. App. 10. During the first phase, the rank-and-file voters from each political party select judicial delegates. *Id.* (citing N.Y. Elec. Law §§ 6-106, -124). Next, those delegates attend a convention at which they pick their party's nominees. *Id.* (citing N.Y. Elec. Law §§ 6-106, -124, -158). The judicial candidates so nominated receive a spot on the general election ballot. *Id.* (citing N.Y. Elec. Law § 7-116(1)). Finally, the State holds a general election at which Justices are elected by rank-and-file voters. *Id.* (citing N.Y. Elec. Law § 8-100(1)(c)). These phases are examined in more detail below.

The First Phase. The New York Constitution divides the State, for election purposes, into 12 judicial districts. N.Y. Const. art. VI, § 6(a), (b). Each judicial candidate stands for election in a particular judicial district.

Each judicial district, in turn, includes a number of smaller "assembly districts." *See* N.Y. Const. art. III, § 5. The number of assembly districts in a judicial district ranges from nine to 24. Pet. App. 11. The delegates who will later attend the judicial district's nominating convention are selected at the assembly district level. Each assembly district in a given judicial district elects several delegates and several alternates. So, for example, a given judicial district might have 10 assembly districts, and Republican voters in each assembly district might elect four delegates and four alternates; this would mean 80 people—40 delegates and 40 alternates—would be chosen to attend that judicial district's subsequent convention and select the party's nominees for the available judicial positions in that district.[2]

Any minimally qualified party member may run in his or her assembly district to be selected as a delegate. The requirements to be placed on the ballot are not onerous—indeed, the *only* relevant requirement of note is that the delegate candidate gather 500 valid signatures from party

[2] The district court found that the actual number of delegates varies from 64 to 248 (including alternates) depending on the size of the judicial district. Pet. App. 12.

members residing in his or her assembly district. *Id.* (citing N.Y. Elec. Law §§ 6-134(4), -136(2)(i), (3)). On delegate-selection day in early September, the rank-and-file party members in each assembly district choose their delegates from among those who have gathered signatures and been placed on the ballot. If the number of candidates for delegate from a given party in a given assembly district is less than or equal to the number of available delegate slots for that party in that district, then, as common sense would dictate, the candidates are all deemed elected—the assembly district does not bother to hold a vote in which, by definition, all candidates will win. *See* N.Y. Elec. Law § 6-160(2). For example, if the Republican Party has three delegate slots in a given assembly district, and only three people run for those slots, all three are deemed elected and their names do not appear on the September ballot filled out by Republican voters.

It is important to note that those interested in running for judge have no role in the delegate selection stage. Voters select delegates, not judicial nominees. The delegate candidates are not pledged to a particular judicial candidate. Pet. App. 107. They cannot be, because the convention that the delegates will later attend is required to select multiple nominees, one for each of the judicial slots up for election. In short, the system set up by New York election law envisions no interaction whatsoever between rank-and-file voters and judicial candidates at the delegate-selection stage. Rank-and-file voters are simply entrusted to select proxies for themselves—unaffiliated delegates who later will pick the nominees for their party. The voters are not picking, and under state law have no say in picking, those nominees themselves.

The Second Phase. Political parties hold their judicial nominating conventions in late September, one to two weeks after the judicial delegates are elected. Pet. App. 18 (citing N.Y. Elec. Law §§ 6-124, -126, -158(5)). At the conventions, any delegate may propose the nomination of any judicial candidate. Once this process is complete, the dele-

gates choose as many nominees as there are open Supreme Court positions in that district.

The Third Phase. Finally, the nominees selected at each party's convention appear on the general election ballot in November. Rank-and-file voters may choose from among these nominees, as well as any other candidates who have petitioned their way onto the general election ballot through the gathering of signatures. *See* N.Y. Elec. Law §§ 6-138, -140, -142.

II. THE SECOND CIRCUIT'S FINDINGS AS TO NEW YORK'S JUDICIAL ELECTION SYSTEM

The Second Circuit's holding, pared to its essence, was that judicial candidates' ability to participate in the electoral process (and therefore voters' ability to choose a candidate of their choice) is severely burdened at both the delegate-selection and the convention stage.

The Delegate-Selection Stage. The court first addressed the delegate-selection stage. It recognized that "judicial candidates do not run in the [delegate] election themselves." Pet. App. 11. But the court apparently did not appreciate that this is because the statutory scheme is designed to funnel the judicial candidates' campaigning energies to the subsequent convention stage. Instead, it created a role for judicial candidates at the delegate-selection stage: It wrote that judicial aspirants "have the option of assembling a slate of delegates to run on their behalf, with an eye toward placing those delegates at the judicial nominating convention so that they can cast their votes in favor of the candidate with whom they are affiliated." *Id.*

This conception of the New York scheme drove the rest of the court's analysis. The court seized on the idea that a judicial candidate should (1) assemble a slate of committed delegate candidates, one from every assembly district, who would guarantee to support him; (2) get all of those delegate candidates on the ballot; (3) market himself to rank-and-file party voters in every assembly district; and (4) let those

voters know which delegate candidates were committed to support him at the convention. The court then proceeded to analyze at great length the feasibility of accomplishing such a feat. It found that the difficulty would be severe for several reasons. First, the judicial candidate would have to find a dedicated delegate candidate in each assembly district—between nine and 24 candidates in all. Pet. App. 11. Second, the judicial candidate would have to get them all on the ballot by collecting enough signatures; it calculated that this would require between 9,000 and 24,000 signatures in total, and that dozens of workers would be required to conduct the signature drive. *Id.* at 13-14.[3] Third, the judicial candidate would have to run a public relations campaign in every assembly district to alert the party's rank-and-file voters as to which delegate candidate was supporting him, so that the voters could effectively choose the judicial nominee of their liking by voting for that candidate's "pledged" delegates. *Id.* at 13. All of this, taken together, is too much for any candidate who is not independently wealthy, the court concluded: It cited testimony from judges and judicial candidates to the effect that these "requirements of the process * * * effectively foreclosed their ability to access the [delegate] election phase." *Id.* at 14.

The Convention Stage. Having found a severe burden on judicial candidates at the delegate-selection stage, the Second Circuit then turned its attention to the convention stage. It noted that, during the period between the delegate elections and the convention, "any Supreme Court Justice aspirant * * * theoretically may lobby the delegates for support." *Id.* at 18. It also recognized that any delegate may support, and propose for nomination, any candidate he likes. *See id.* at 18, 28. It nonetheless found a severe burden on candidates at the convention stage, for two reasons.

[3] The court reached this total by using a figure of 1,000 signatures per delegate candidate, on the assumption that the validity of signatures would be challenged and therefore the required 500 per candidate was actually insufficient. *Id.* at 13.

First, it found that "the time frame for lobbying delegates is unrealistically brief," because the approximately two-week period between the delegate election and the convention is insufficient time for a judicial candidate without high-level party support to lobby all of the delegates and alternates in his judicial district. *Id.* at 18. It reached this conclusion despite the fact that most delegate elections are uncontested, and in those cases the identities of the delegates are known—and lobbying may begin—as soon as delegate signature petitions are due in July. *Id.* In other words, the Second Circuit relied on a "unrealistically brief" two-week time frame, even though the more typical time frame for lobbying delegates is at least two months—or four times as long.[4]

Second, the court found that for judicial aspirants without the party leadership's imprimatur, lobbying of delegates is usually fruitless in any event because "delegates do not exercise their own judgment when deciding which candidate to support. Instead, they endorse the choice" of local party leaders. *Id* at 19. Specifically, the court cited testimony to the effect that in at least some judicial districts, (a) the party leadership meets before the convention to select favored candidates, (b) the leadership makes recommendations to the delegates as to which candidates to nominate, and (c) the delegates usually nominate the candidates that the party leadership recommends, even though the leadership issues no explicit commands to that effect. *Id.* at 19-22. The Second Circuit found that this system constituted a "severe" burden on judicial candidates' associational rights, *id.* at 45, even though it recognized that delegates do not have to, and do not always, follow the party leaders' wishes as to whom they should support.[5]

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[4] The court dismissed the importance of this fact by noting that "at least one candidate who attempted to obtain the names of delegates prior to the primary found her effort thwarted by local party officials." *Id.* at 18-19.

[5] For example, the court noted that when respondent Margarita López Torres ran for a Supreme Court nomination, two delegates at the judicial convention attempted to nominate her even though

The Second Circuit concluded that these supposed burdens at the delegate-selection and convention stages constituted "a network of restrictive regulations." *Id.* at 53. It held that the effect of these regulations was to "*exclude*[ ] qualified candidates and voters from participating in the primary election and subsequent convention, and thus severely limit[ ] voter choice at the general election." *Id.* (emphasis in original). Applying strict scrutiny, *id.* at 70, the court affirmed the district court's conclusion that the election laws under review were not narrowly tailored to advance a compelling state interest. *Id.* at 70-76.

SUMMARY OF ARGUMENT

Both of the conclusions underlying the Second Circuit's holding in *Lopez Torres*—first, that judicial candidates are burdened at the delegate-selection stage by the difficulty of assembling a slate of delegates, and second, that judicial candidates are burdened at the convention by the difficulty of successfully lobbying delegates—are severely flawed.

The first conclusion stems from a mistaken understanding of fact: New York's scheme never envisioned that a judicial candidate would attempt to assemble a slate of committed delegates, and therefore criticizing that scheme for making it "difficult" for a candidate to participate in a way that was not intended takes the analysis in the wrong direction.

The second conclusion stems from a misunderstanding of law: The main "burden" identified by the court is that delegates to the nominating conventions often follow the recommendations of party leaders in deciding whom to nominate. But this "burden" has nothing whatsoever to do with state law; it is the result of voluntary choices made by voters throughout the party hierarchy, from rank-and-file party members to judicial delegates to party leaders. Re-

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she had fallen out of favor with the local Democratic Party leadership. *Id.* at 28. And at the 2002 convention, López Torres received 25 delegate votes to her adversary's 66, even though she had not received party leaders' backing. Tr. 827-828.

spondents' attack on the state law was therefore misplaced, as was the Second Circuit's conclusion that that law burdens constitutional rights. Furthermore, parties from time immemorial have established hierarchies, and those hierarchies have supported candidates for office. If these choices are sufficient to render a state election scheme unconstitutional, then vast numbers of state and national election laws are vulnerable to judicial invalidation.

In short, the Second Circuit posited a judicial election system that never existed, and an unrealistic conception of political parties, and then punished New York State for failing to offer what does not exist. This Court should review the Second Circuit's intrusion into both party associational rights and state prerogatives to make clear that this intrusion was unwarranted.

ARGUMENT

I. NEITHER JUDICIAL CANDIDATES, NOR ANY OTHER ACTORS, FACE A CONSTITUTIONALLY SIGNIFICANT BURDEN AT THE DELEGATE-SELECTION STAGE.

Perhaps the most important fact in this case, and one thoroughly obscured in the Second Circuit's opinion, is that anyone who wants to do so can run to be a delegate at the judicial nominating convention. There are no significant barriers to participation in this process, for either voters or candidates—the "candidates" being the delegate candidates.

Delegate candidates may earn a spot on the delegate ballot by simply obtaining 500 signatures from registered party voters. This signature requirement is unobjectionable on its face. *See American Party of Texas* v. *White*, 415 U.S. 767, 789 (1974) (stating that any argument that a 500-signature requirement is objectionable "approaches the frivolous"); *Jenness* v. *Fortson*, 403 U.S. 431, 438, 442 (1971) (approving requirement that minor-party candidates gather signatures from five percent of the number of registered voters at the last election to appear on the general election ballot).

As for the voters, they may cast their vote for any would-be delegate who fulfills the modest signature requirement. None of the sorts of structural barriers that have led this Court to strike down state ballot access laws are present here. *See, e.g., Bullock* v. *Carter*, 405 U.S. 134 (1972) (striking down exorbitant filing fees required to run in primary elections for local offices); *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983) (striking down Ohio law barring candidates from a spot on the ballot for U.S. president unless they registered more than seven months in advance). Indeed, this Court's primary concern has been with ballot access restrictions that tend to "'limit the field of candidates from which voters might choose,'" *Celebrezze*, 460 U.S. at 786 (quoting *Bullock*, 405 U.S. at 143); here, there are no such restrictions.

The Second Circuit nonetheless found a severe burden on associational rights at the delegate-selection stage. But it did so by erecting a straw man. The court asked this question: how difficult would it be for a judicial candidate to recruit a full slate of delegate candidates across numerous assembly districts, publicize to all voters those delegate candidates' affiliation, and obtain all the required signatures in every district to get every delegate candidate on the ballot? The answer it gave was that it would be quite difficult. Yet, the reason for that difficulty is precisely that the system was never designed to permit such an approach—a judicial candidate is not *supposed* to campaign directly to primary voters; the judicial candidate is instead supposed to address his campaigning to the unaffiliated delegates at the convention. At the delegate-selection stage, delegate candidates are not supposed to be pledged to any judicial candidate. This was made clear by New York City Board of Elections Commissioner Douglas Kellner, who testified that "the idea that an individual candidate would go out and recruit delegate candidates and run delegates pledged to that candidate in the primary is not the system and it twists the design of the system on its head." Pet. App. 17.[6]

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[6] Commissioner Kellner's testimony is supported by the findings of the district court itself, which noted that with one exception, all

Thus, the Second Circuit's discussion of the "burden" on judicial candidates at the delegate-selection stage misses the point. Judicial candidates have no role at this stage and thus can suffer under no burden. The supposed burden of collecting 24,000 signatures is a fallacy; the signature requirement is 500—*i.e.*, the requirement for an individual resident to run—and it falls on individual delegate candidates, not on judicial candidates. The supposed burden of conducting a campaign across all assembly districts to enlighten rank-and-file voters as to which delegate candidates are in a judicial candidate's pocket also is non-existent. And the supposed burden of recruiting sufficient committed delegates is no burden at all, because state law does not contemplate that a judicial candidate would attempt any such feat.

In short, the Second Circuit found a burden on judicial candidates at the delegate-selection stage by supposing state electoral requirements that do not in fact exist and then finding that it would be difficult to meet those non-existent requirements. The supposedly burdensome "requirements" can be found nowhere in the text of New York's election law. This approach to ballot access questions has no support in this Court's jurisprudence; on the contrary, the cases have focused tightly on the text of the challenged law and the gloss given that text by state court precedent. *See, e.g.*, *Republican Party of Minnesota* v. *White*, 536 U.S. 765, 770-771 (2002). Indeed, it is unsurprising that the Second Circuit's approach is devoid of precedential support. One obviously cannot evaluate the burdens imposed by a state election scheme by reference to the difficulty of performing acts not required or even contemplated by that scheme.

The Second Circuit's misunderstanding on this point seems to stem from its notion that like some primaries (*viz*, the presidential primaries, with their committed delegates), the delegate-selection stage of the New York Supreme Court

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defendants in this case agreed that "the system is not designed for challenger candidates to run their own slates of delegates." Pet. App. 168.

election is designed to give rank-and-file voters a *direct* say in who the nominees of their party will be. *See* Pet. App. 17 (referring to the delegate-selection stage as an "open primary"); *id.* at 53 (stating that part of the basis for plaintiffs' claim is that "the regulations effectively prevent a party member from voting for their preferred candidate"). Proceeding from this premise, the court concluded that (1) rank-and-file voters are not being given the direct say to which they are entitled in picking nominees, and (2) this is a constitutional infirmity, because once New York granted the rank-and-file voters an entitlement to choose judicial nominees, it had to comport with the First Amendment protections that accompany any voting right. *See id.* at 34-35. The problem with this analysis is that the premise is simply incorrect. There is no evidence that the New York statutory scheme is designed to give rank-and-file voters a direct say in choosing nominees; to the contrary, the plain text of the law, and the testimony of Commissioner Kellner, make clear that they are meant to have a say only in choosing unaffiliated delegates. And there is no claim, nor could there be one, that New York is constitutionally *obligated* to give party voters a direct say in choosing nominees. Of course, it could have chosen by statute to give voters such a say; on the other side of the coin, it could have chosen to provide for direct selection of judicial nominees by party leaders alone at closed conventions, without input from elected delegates. *See American Party of Texas*, 415 U.S. at 781 ("It is too plain for argument, and it is not contested here, that the State * * * may insist that intraparty competition be settled before the general election by primary election or by party convention."). It chose a middle ground with features of each, and it was entitled to that choice. The Second Circuit went too far in invalidating that choice—the oft-confirmed, deliberate choice of a sovereign state as to how to structure its judicial elections—and replacing it with another among the range of permissible election structures.

Finally, it is worth emphasizing that the Second Circuit's reliance on this straw man was central to the court's conclusion that the state scheme as a whole severely burdens

associational rights. *See* Pet. App. 46 (stating that the delegate-selection stage "is of central importance to the entire electoral process because it effectively dictates the result of the convention"). The Second Circuit's conclusion cannot stand once this wobbly leg is knocked aside.

II. THE SUPPOSED "BURDEN" IDENTIFIED BY THE SECOND CIRCUIT AT THE CONVENTION STAGE HAS NOTHING TO DO WITH THE STATE LAW ITSELF AND IS NOTHING MORE OR LESS THAN PARTY POLITICS IN ACTION.

Because, viewed correctly, there is no burden on First Amendment rights at the delegate-selection stage of New York's judicial elections, that half of the Second Circuit's justification for striking down the law falls away. The court's decision thus must stand or fall on the supposed burdens it identified at the next stage of the judicial election—the convention itself. In other words, the Second Circuit's holding is reduced to something like the following: "New York's judicial election system is unconstitutional because (a) in a minority of cases, judicial candidates have a relatively short period of time to lobby convention delegates for support, and (b) often, when party leaders tell the delegates whom the leaders think should be nominated, the delegates nominate that person."

The first of these conclusions is quite weak and is not central to the Second Circuit's decision.[7] This brief focuses on the second conclusion—namely, that party-leader influence over convention delegates renders the state's election law unconstitutional. This conclusion is erroneous for at least two reasons. First, the burdens identified by the Second

[7] The conclusion is analytically weak because, as the Second Circuit noted, the two-week lobbying period that caused the court such consternation is the rule only in a minority of cases—those in which the delegate election is contested in the first place. *See* Part I, *supra*. The Second Circuit explicitly acknowledged that the other supposed burden—that of party-leader influence over delegates—is the more important basis for its finding of a severe burden at the convention stage. *See* Pet. App. 19.

Circuit have nothing whatsoever to do with the state laws under review, but instead stem from the decisions of private actors. Second, the behavior of party actors that the court condemns as a severe burden on the First Amendment represents nothing more or less than a permissible, and long-accepted, political party structure; if it is sufficient to render New York's law unconstitutional, then a broad swath of state and federal election systems throughout the country must similarly be unconstitutional.

A. The Burdens Identified By The Second Circuit Do Not Stem From The Laws Under Review.

The Second Circuit found that "a candidate who lacks the support of her party's leadership has no actual opportunity to lobby delegates" because "delegates do not exercise their own judgment when deciding which candidate to support. Instead, they endorse the choice of * * * the local party leadership." Pet. App. 19. The court's objection, broken down to its component elements, is that (1) state party leaders recommend preferred candidates to the convention delegates, and (2) the delegates often accept these recommendations, sometimes with little or no debate.

But if this is the Second Circuit's objection, it does not follow that New York's election law is unconstitutional. The state election rules under review have nothing at all to say about whether party leaders should recommend preferred candidates, or about whether delegates should choose to follow those recommendations. To the contrary, under state law the delegates have the freedom to support whomever they like, and judicial candidates have the freedom to lobby those delegates for support.[8] In short, the Second Circuit

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[8] Relatedly, at the delegate-selection stage, any party member is free to run for delegate. *See* Part I, *supra*. It is true that relatively few rank-and-file party members choose to do so. But that is not because of structural or other obstacles created by law. To the contrary, it appears to be due to a simple lack of interest on the part of the citizenry; this lack of interest creates a lack of "unaffiliated" candidates, and as a result the candidates picked by party insiders

identified nothing at all objectionable about the state law itself; instead, it struck down the law as a response to what it saw as objectionable intraparty behavior.

There is no precedent for the Second Circuit's ruling. This Court has never struck down a state election law on First Amendment grounds based on the way the state's political parties operated within the ambit of the law. Indeed, in every ballot access case relied on by the Second Circuit, this Court's analysis focused on the effect of *the state provisions themselves*—not the effect of another actor—on the franchise. In *Williams* v. *Rhodes*, 393 U.S. 23 (1968), the Court struck down Ohio election provisions because the provisions themselves made it nearly impossible for third parties to get on the presidential ballot. In *Bullock*, 405 U.S. 134, the Court struck down a Texas filing fee because the fee itself made it impossible for non-affluent candidates to run for office. And in *Celebrezze*, 460 U.S. 780, the Court struck down Ohio's early filing deadline because the deadline itself flatly and unnecessarily excluded candidates who made a late decision to run for president.

This is as it should be, for it is the law itself, not the actions of other parties, that is being challenged. If the mere fact of top-heavy party influence could render an otherwise innocuous state law unduly burdensome, then the law could become constitutional, unconstitutional, and then constitutional again as a state party leader's power waxed and waned, even without a change in the actual text under review. Such a rule would defy logic. Perhaps more importantly, it would create an impenetrable constitutional thicket for future courts, which would be duty-bound to judge the constitutionality of state laws based not on their text, but on the private, and potentially shifting behavior of party officials acting within the ambit of those laws. This Court should end such mischief before it begins.

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often win without a fight. But lack of citizen participation is not an unconstitutional burden on First Amendment rights.

B. There is Nothing Constitutionally Infirm About The Party Dynamic At The Conventions.

Even if the Second Circuit could strike down a state law to correct behavior that the state law does not endorse or encourage, it singled out the wrong behavior here: There is nothing constitutionally objectionable about the behavior of state party leaders or delegates at the judicial conventions.

Again, the court's objection is that party leaders recommend preferred candidates to the convention delegates and the delegates often accept these recommendations. But these facts cannot constitute a severe burden on the associational rights of non-favored candidates sufficient to trigger strict scrutiny. It is a *sine qua non* of party politics that party leaders organize the rank-and-file, set goals, and endorse candidates who best advance those goals; indeed, these are recognized associational rights of parties *qua* parties. *See, e.g., Eu* v. *San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 216 (1989); *Tashjian* v. *Republican Party of Connecticut*, 479 U.S. 208, 224 (1986). If New York's election law is unconstitutional simply because party leaders wield influence over party decision-makers, then the election laws of most states would seem to be vulnerable to the same objection. Furthermore, it would also seem to follow that presidential nominating conventions from the mid-19th century through at least 1972—when pre-pledged delegates became the norm[9]—were all unconstitutional.

In *Ripon Society* v. *National Republican Party*, 525 F.2d 567 (D.C. Cir. 1975), *cert denied*, 424 U.S. 933 (1976), the U.S. Court of Appeals for the D.C. Circuit recognized the political reality that the Second Circuit seeks to deny here—

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[9] *See, e.g.*, AMERICAN PRESIDENTIAL ELECTIONS: PROCESS, POLICY, AND POLITICAL CHANGE 14 (Harvey L. Schantz ed., 1996) ("National party conventions prior to 1972 were generally under the control of state party leaders. * * * [P]ower and control over delegates were historically held by state party leaders. In 1968, when Hubert Humphrey won the Democratic Party nomination for president, his major strategy was the courtship of party leaders. He did not even enter a single primary.").

namely, that party leaders sometimes have significant say in who will carry the party's colors at the general election. It wrote that the party leadership there in question (the 1970s-vintage Republican National Committee) "makes numerous important political decisions during the periods between national conventions—whose policies are favored in party publications and pronouncements, whose local campaigns are aided by appearances of nationally prominent party members, and so on. The fortunes of presidential hopefuls rise and fall with such decisions." *Id.* at 582. The court noted that "administrative decisions" such as "appointments of subcommittees and their chairmen, delegate seating and accommodations, [and] media coverage" played a "crucial role" in the outcome of the 1968 Democratic Convention. *Id.* at 583 n.51 (citing COMMISSION ON THE DEMOCRATIC SELECTION OF PRESIDENTIAL NOMINEES, THE DEMOCRATIC CHOICE 40-43 (1968)). It further noted that in many states, as recently as 1968, the selection of delegates to the presidential nominating convention was "made not in a primary election but through a series of local, county, and state caucuses and conventions. * * * [O]ften voter participation [was] so slight as to make the selection process one virtually (or even officially) of appointment by party officials." *Id.* at 584. The *Ripon* court concluded:

> There are a number of respects, then, in which the parties conduct their affairs other than by giving equal attention to the preferences of * * * all party adherents. Perhaps this is not surprising. A party is after all more than a forum for all its adherents' views. It is an organized attempt to see the most important of those views put into practice through control of the levers of government. One party may think that the best way to do this is through a 'strictly democratic' majoritarianism. But another may think it can only be done (let us say) by giving the proven party professional a greater voice than the newcomer. *Which of these approaches is the more efficacious we cannot say, but the latter certainly seems a more accurate description of how political parties oper-*

ate in reality. [*Id.* at 584-585 (emphasis added) (citations omitted).]

The Second Circuit attempts to square its unrealistic view of political parties with that elaborated in *Ripon*, *see* Pet. App. 49-51, but its effort is unavailing.[10]

The Second Circuit, in sum, failed to respect the associational rights enjoyed by parties to endorse and support candidates, and to structure their internal association, as they see fit. *See, e.g., Eu,* 489 U.S. at 216. By invalidating a party's attempt to run party members for delegate slots, and to recommend preferred candidates to those party members and others who subsequently win the delegate slots, the court gave short shrift to the associational rights protected by *Eu* and its progeny. This is especially so given that, as explained above, New York's judicial convention system does not in any event burden the associational rights of voters or candidates. In such a setting, the parties' associational rights should have been respected.

III. THE SECOND CIRCUIT SHOULD NOT HAVE APPLIED STRICT SCRUTINY.

Even if there were cognizable burdens on associational rights in this case, which there are not, the New York statutory scheme would have survived review had the Second Circuit applied the correct level of scrutiny. As the court noted, strict scrutiny only applies in this context where the burdens on associational rights imposed by the law under review are severe. Pet. App. 36 (citing, *inter alia*, *Bullock*, 405 U.S. at 147). Here, properly viewed, the law imposes no severe burdens. The court therefore should have applied "a relaxed standard of review, according to which the restrictions generally are valid so long as they further an important state interest." *Id.*

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[10] *Amicus* agrees with petitioners that the Second Circuit's decision not only creates a circuit split but also conflicts with decisions of this Court, including *American Party of Texas*, *supra*.

Under that standard, several of the justifications put forward by petitioners (*see* Pet. App. 70) should have been sufficient to uphold the New York law. To take just one example: The Second Circuit recognized that "under New York's scheme, parties do retain the right to select a preferred candidate and advocate on her behalf, and we agree that protecting those rights is a compelling state interest." Pet. App. 71 (citing *Eu*, 489 U.S. 214). But it concluded that "the current scheme is not narrowly tailored to achieve that end because there exist several less onerous means by which a state may secure the party's right to guide its own association in this fashion." *Id.* Applying relaxed scrutiny, the law would not be required to meet such a narrow tailoring requirement and would survive review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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